RSA 125/1999
BEFORE
HON'BLE MR. JUSTICE A.C. UPADHYAY
JUDGMENT AND ORDER

1. This appeal filed by the appellant-defendant is directed against the judgment and decree dated 14.6.1999, passed by Civil Judge (Senior Division), Hailakandi, in Title Appeal No.29 of 1995, reversing the judgment and decree dated 20.9.1995 passed by the Munsiff No.2, Hailakandi in Title Suit No.79 of 1988.

2. The facts leading to the filing of this appeal may be stated as follows -

The predecessor of proforma defendant Nos.4 to 10, late Jogendra Chandra Deb and predecessor of proforma defendant Nos.11 and 12 and 21 to 32, late Gojendra Chandra Dey, were the owners of the suit land. Since the owners were brothers, they amicably partitioned the land. The suit land along with other land fell into the share of late Jojendra Chandra Dey and accordingly, he became owner and possessor. Thereafter the said Jogendra Chandra Dey sold out the suit land to one Makhon Lal Dey on 24.3.1971. Makhan Lal Dey filled the suit land by digging a tank inside it and also constructed a house with a bamboo and thatch.

3. Makhon Lal Dey became ill sold out the suit land along with other lands to the defendant No.3, Promobala Dey by registered sale deed dated 17.4.1974 and handed over the possession to the defendant No.3.

4. Sometime in 1974 the defendant No.3 left her homestead situated near the suit land and shifted to another place. However, while shifting, she left the suit land under the care and custody of the predecessor of defendant No.2 (ka) to 2(cha). During the last part of 1986, defendant No.3 the predecessor of defendant No.2 (ka) to 2(cha) constructed a house with wooden frame with kerosene tin roofing and also constructed a hut on the eastern side and refused to hand over the possession of the suit land. Defendant No.3, Smti. Premobala Dev, who is the mother of the plaintiff Smti. Sabitri Rani Deb sold out the suit land to the plaintiff by registered sale deed dated 4.11.1987. Since the plaintiff failed to get the possession over the suit land from the defendants, she filed the suit for declaration that the plaintiff is the owner of the suit land by virtue of purchase, with a prayer for khas possession over the suit land by evicting the defendants from the suit land. The defendants contested the suit both in facts and in law, by filing their written statement. The defendant contended that the suit is bad for waiver estoppel and acquiescence and the suit is barred by the law of limitation. The defendant also denied the sale of the suit land to the defendant No.3 in the year 1974 and also denied that defendant No.3 left the suit land under the care and custody of the predecessor of the defendants No.2(ka) to 2(cha). The defendants stated in their written statemen that Jogendra Chandra Dey and Gajendra Chandra Dey were the original owners of the suit land along with other lands, and Jogendra Chandra Dey became the absolute owner of the suit land by amicable partition between two brothers, who subsequently disposed of the suit land by selling it to Makhon Lal Dey, by executing a registered sale deed on 24.3.1971. It is further contended in their written statement that Makhon Lal Dey subsequently sold out the suit land to the predecessor of the defendants No.2(ka) to 2(cha) at Rs.1500/- by a registered sale deed dated 10.11.1975. The predecessor of the defendants No.2(ka) to 2(cha) also constructed two thatched house over the suit land with bamboo and kerosene tin shed. The defendants in their written statement further stated that the purchase made by the plaintiff of the suit land from defendant No.3 is collusive, since no consideration thereof in respect of the suit land was paid and further the plaintiff also did not record her name in the Jamabandi and as such prayed for dismissal of the suit.

5. The defendant also filed a counter claim with a prayer for declaration that the registered sale deed dated 17.4.1974, which was executed by Makhon Lal Dey, in favour of his mother was collusive and without consideration money and th

us void ab-initio, and was therefore the plaintiff could not have acquired title by virtue of the registered sale deed dated 4.11.1987, by which the plaintiff purchased the suit land from his mother.

6. On the basis of the pleadings of the parties in the suit as well as the counter claim the following issues were framed by the learned trial Court -

1. Is there any cause of action for the plaintiff?
2. Is the suit maintainable?
3. Is the suit bad for non joinder of necessary parties?
4. Is the suit barred by waiver estoppal and acquiseence?
5. Is the suit barred by limitation?
6. Is plaint properly signed and verified?
7. Whether the plaintiff has been possession of the suit land?
8. Is the alleged story of allowing the defendant No.1 and 2 to live in suit land is true?
9. Has the plaintiff any right title in the suit land?
10. To what relief if any the plaintiff is entitled?

The learned trial Court has also framed two additional issues -

1. Whether Late Surabala Deb the predecessor of the defendant No.2(ka) to 2 (cha) acquired right title and interest over the suit land by purchase the said land from Makhanlal Dey?

2. Whether the deed No.3398 of the year 1974 by which the defendant No.3, Premobala Deb purchased the suit land from Makhanlal Dey, is genuine?

7. During the course of the hearing, the plaintiff side examined four (4) witnesses and on the other hand, the defendant examined two witnesses. On careful scrutiny of the evidence on record, the trial Court dismissed the suit on contest without cost. However, learned trial Court decreed the counter claim of the defendant on contest declaring therein that Exbt-2 i.e. deed No.3398 executed in the year 1974, by which the defendant No.3, Premobala Deb purchased the suit land from Makhonlal Dey is collusive and illegal and without consideration and having no force in the eye of law. Learned trial Court further declared that the plaintiff did not acquire any right title and interest over the suit land by purchasing the same from her mother Premobala Deb, defendant No.3 by exhibit-1 i.e. deed No.3398 of the year 1974.

8. Being aggrieved, the plaintiff-appellant preferred a Title Appeal in the Court of Civil Judge, Senior Division, Hailakandi. The learned appellate Court after careful scrutiny of the materials on record and considering the grounds set up in the appeal by the plaintiff-appellant, allowed the appeal and set aside the judgment and decree of the trial Court in the counter claim preferred by the counter claim. The appellant has challenged the decree aforesaid of the Ist appellate Court by filing this second appeal. The second appeal was admitted for hearing by this Court on the following substantial questions of law -

1. That the substantial question of law arises as to whether the claim of right, title and interest of the plaintiff over the suit land on the basis of deed dated 4.11.1987 (Exhibit-1) and 17.4.1974 (Exhibit-2), are legally sustainable under Section 53 of the Transfer of Property Act, 1882?
2. That the substantial question of law arises in this case as to whether the sale deeds exhibits 1 and 2 could confer any right, title and interest to the plaintiff over the suit land under Section 54 of the Transfer of Property Act, 1882, in absence of delivery of possession of the suit property at the time of the alleged sale?

9. Mr. Majarbhuiya, learned counsel for the appellant referring to the decision of the appellate Court submitted that the sale deed executed by Makhan Lal Dey on 17.4.1974 did not confer any title to the plaintiff, since sale was made

by the said Makhon Lal Dey to defraud other creditors. Learned counsel further submitted that the sale which was made simultaneously without the knowledge of the defendant-appellant was never made public and it was not known to the appellant-defendant at the time of purchase of the suit land from Makhon Lal Dey on 10.11.1975. Learned counsel emphasized on the fact that the appellant immediately after purchasing of the suit land by making payment of the consideration money took over possession of the suit land. Over and above, Mr. Makhon Lal Dey at the time of the execution of the sale deed also handed over the sale deed by which Makhon Lal Dey had purchased the suit land from the original owner. Learned counsel for the appellant further submitted that there is no iota of evidence to establish that the plaintiff were ever in possession of the suit land and further it also could not be established by the plaintiff that they were put by the defendants, in possession of the plot of land, as licencee. Further more, as contended by the learned counsel for the appellant that the plaintiffs could not explain as to how the original title deed of Makhon Lal Dey came into the hands of the defendant.

10. The facts remains that on 17.4.1974, Makhon Lal Dey sold out the suit land to his mother by a registered sale deed and subsequently on 10.11.1975, Makhon Lal Dey executed another sale deed in respect of the suit land whereby, the suit land was sold out to the defendant. Apparently, subsequent sale would not be valid in the eye of law since after the first sale was made by the vendor owner, he did not have any substantive right to sell the land to any other potential purchaser. Unless of course, the defendant can establish that the first sale made by the plaintiff was a nullity or void ad-initio.

11. Learned counsel for the appellant in order to sustain the argument that the sale deed dated 4.11.1987 (exhibit-1) and 17.4.1974 (exhibit-2) are not legally sustainable as per provision of Section 53 of the Transfer and Property Act 1882, submitted that at the time of sale of the property by Makhon Lal Dey to his mother no consideration amount passed from the predecessor, to the vendor of the property. Therefore, the sale, prima-facie is not valid in the eye of law. However, on scrutiny of the materials on record, it appears that PW-1, who is the deed writer proved that exhibit-1 was executed by one Probhaboti Dey in favour of Sabitri Rani Deb. The witness also proved the signature in the sale deed and the endorsement of thumb impression made therein. The said witness also deposed that he wrote exhibit-2 which was executed on 17.4.1974. The evidence of witness of PW-2 asserted that one Jogendra Chandra Dey was the original owner of the suit land from which the brother of the plaintiff Makhon Lal Dey, purchased the suit land and erected thatched house on it. The witness further deposed that since defendants are relation of Makhonlal Dey, he allowed the defendant to stay in the suit house as care taker of the land and subsequently the said Makhonlal Dey expired. After the death of Makhonlal Dey, the mother of Makhonlal asked the defendant to vacate the suit land, but the defendants refused to vacate and forcibly erected one thatched house over the land. PW-3 also corroborated the statement of PW-2 to state that Makhon Lal Dey was the previous owner, who allowed occupation of the suit land to the defendants as care takers. The plaintiff herself in her deposition stated that her brother Makhon Lal Dey purchased the land from Jogendra Ch. Dey and constructed the thatched house therein and subsequently sold the suit land to the mother on 17.4.1974 of the plaintiff since Makhonlal was in need of money.

12. However, the sale deed exhibit=B shows that the predecessor of the defendant 2(ka) to 2 (cha) purchased the suit land from Makhonlal on 10.11.1975 i.e after about one and half years from the date of execution of sale deed exhibit-2. The evidence of the witness clearly shows that the predecessor of the defendant Nos.2(ka) to 2 (cha) were put in possession of the suit land to look after the said. Apparently, at the time of sale of the suit land by Makhonlal to his mother the defendants were in possession of the suit land, as care taker. The defendants on the other hand by adducing the evidence of DW-1, Subhudhini Dhar tried to

establish that Makhonlal sold out the suit land to one Surobala Dey in the year 1971, who constructed thatched house over the land. However, the witness admitted that no right over the suit property was acquired in terms of the sale deed. DW-2 asserted that the defendant No.1, Subhudhini Dhar is living in the suit land and she is the sister in law of Surobala Dey and stated that he has no personnel knowledge of execution of the deed in respect of the suit land. Now from the evidence on record, it clearly transpires that Makhonlal sold out 4 Bigha 18 Katas 6 chatak of land to his mother on 17.4.1974 on receiving a consideration amount of Rs.300/- It also appears that said Makhonlal on 10.11.1975 after about one and half years after the execution of the exhibit-2 sold out the suit land at a price of Rs.1500/- to Surobala Dey, the predecessor of defendant No.2 (ka) to 2 (cha) by exhibit-B. Though the name of the defendant No.3, the mother of the Makhonlal does not appear in the Jamabandi by virtue of purchase on 17.4.1974 that itself does not preclude the right of the purchaser, who has acquired right, title and interest by valid purchase of the suit property.

13. Apparently, on perusal of the materials on record, it does not transpires that the sale deed in question i.e. exhibit-2 was a collusive one and it cannot be said that the transaction is illegal and hit by Section 53 of the Transfer and Property Act 1988. The facts remain that since exhibit-2, sale deed No.3398 was a valid sale deed executed by Makhonlal Dey in the year 1974. The subsequent sale deed executed by Makhonlal cannot transfer any right title and interest over the suit land to the predecessor of the defendant No.2 (ka) to 2 (cha). Therefore, the predecessor of defendant No.2(ka) to 2 (cha) could not acquire any right, title and interest of suit land by way of purchase from Makhonlal vide exhibit-B which was executed subsequently.

14. Overwhelming evidence on records clearly depicts that the predecessor of defendant No.2(ka) to 2(cha) was inducted into the suit land as care taker by defendant No.3, who subsequently refused to vacate the suit land.

15. In Delhi Motor Co. v. U.A. Basrurkar, (1968) 2 SCR 720 the Apex Court held that Section 53-A of the Transfer of Property Act, is only available as a defence to a lessee and not as conferring a right on the basis of which the lessee can claim rights against the lessor. This interpretation of Section 53A was clearly laid down by their Lordships of the Privy Council in Probodh Kumar Das and Others v. Dantmara Tea Company Limited 66 IA 293

16. In Shrimant Shamrao Suryavanshi v. Pralhad Bhairoba Suryavanshi, (2002) 3 SCC 676, at page 682 , the Apex Court held as follows::

16. But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the Act. The necessary conditions are:
(1) there must be a contract to transfer for consideration of any immovable property;
(2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
(3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
(4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof;
(5) the transferee must have done some act in furtherance of the contract; and
(6) the transferee must have performed or be willing to perform his part of the contract.
17. We are, therefore, of the opinion that if the conditions enumerated above are complied with, the law of limitation does not come in the way of a defendant taking plea under Section 53-A of the Act to protect his possession of the suit property even though a suit for specific performance of a contract is barred by limitation.

17. Mr. B.R. Dey, learned senior counsel for the petitioner by relying on th e decision of the Supreme Court reported in (1990) 4 SCC 45 (2) submitted that thus it is obvious that the conclusions which were arrived at by the first appel late court were reasonable and legal besides being conclusions of facts. There w as, therefore, no question of law involved in the second appeal. There is no sco pe to interfere with the findings ignoring the mandatory provisions of Section 100 of the Civil Procedure Code that unless it was satisfied that the case invo lved a substantial question of law it could not entertain .

18. Learned counsel for the defendant submitted that subsequent purchaser of immoveable property would not acquire any right, title and interest over the pr operty if the earlier sale is found to be genuine and valid. The determination of the comparative rights and priorities of successive assignees of the similar or overlapping rights has been a dilemma for the Courts. When there are two o r more competing equitable interests, the equitable maxim qui prior est tempore potior est jure (he who is first in time is stronger in law) applies. This mea ns that the first in time prevails over the others. The principle that no man ca n convey a title than what he has.

19. When similar rights are created in favour of two persons at different times, the one who has the advantage in time should also have the advantage in law. This rule, however, applies only to cases where the conflicting equities ar e otherwise equal. Section 48 of the Transfer of Property Act 1882 is founded up on the important principle that no man can convey a title than what he has. If a person has already effected a transfer, he cannot derogate from his grant and d eal with the property free from the rights created under the earlier transaction . Section 48 is an absolute in its terms and does not contain any protection or reservation in favour of a subsequent transferee who has no knowledge of the pri or transfer.

20. Section 48 determines the priority when there are successive transfers . It provides that where a person purports to create by transfer at different ti mes rights in or over the same immovable property, and such rights cannot all ex ist or be exercised to their fullest extent together, each later created right s hall, in the absence of a special contract or reservation binding the earlier tr ansferees, be subject to the rights previously created.

21. In the facts and circumstances of the case, on the basis of the abo ve discussions, the question of law arising for this Court’s determination, as n oticed above, shall stand accordingly answered. The second appeal preferred by t he appellant being devoid of merit, accordingly stands dismissed. Consequently, the judgment and decree dated 20. 9. 95 passed by the learned First Appellate Co urt in Title Appeal No. 29 of 1995 shall stand affirmed. I pass no order as to cost.